

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for Forbearance)	WC Docket No. 09-135
Pursuant to 47 U.S.C. § 160(c) in the Phoenix,)	
Arizona Metropolitan Statistical Area)	
)	

MOTION FOR SUMMARY DENIAL

The undersigned signatories, (referred to herein as “Joint Movants”), through counsel, and pursuant to Sections 1.1, 1.45 and new Section 1.59 of the Commission’s rules,¹ hereby move the Commission to summarily deny the above-captioned petition of Qwest Corporation (“Qwest”) for forbearance within the Phoenix, Arizona Metropolitan Statistical Area (“MSA”).²

I. INTRODUCTION AND SUMMARY

Qwest currently has two virtually identical forbearance petitions pending at the Commission. The above-captioned petition seeks the same regulatory relief in the same geographic market as the Phoenix forbearance petition recently remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit.³ Indeed, the only reason Qwest filed the instant

¹ 47 U.S.C. §§ 1.1, 1.45, 1.59. The Joint Movants are aware that Section 1.59 does not take effect until September 8, 2009. Until that time, existing Rules 1.1 and 1.45 apply.

² *Petition of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135 (filed Mar. 24, 2009) (“*Second Phoenix Petition*”).

³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007) (“*First Phoenix Petition*”).

forbearance petition was because the Commission denied its first petition seeking forbearance in the Phoenix MSA and it wished to compel the Commission to revisit its decision. With the Court's remand of the Commission's order denying forbearance, Qwest has won the second look at the Phoenix market that it so desired. Thus, there is no need to conduct a separate parallel proceeding to address Qwest's second Phoenix petition.

If the instant motion is not granted and the second Phoenix petition remains before the Commission, the same participants will be forced to undertake the identical tasks performed for the remand proceeding. The Commission, Qwest, and interested third parties each will be required to duplicate their efforts with no discernable additional benefits. The Commission can, and should, prevent this needless waste of agency and industry resources by expeditiously granting this motion.

II. BACKGROUND

In April 2007, Qwest filed separate petitions seeking forbearance from loop and transport unbundling obligations pursuant to Section 251(c)(3) in the Phoenix MSA and three other geographic markets.⁴ Qwest argued that it faced competition in the Phoenix MSA "from a wide range of technologies and a broad array of service providers" and that forbearance was warranted on the basis of the "multiple competitive alternatives [] available to mass market and enterprise customers alike."⁵ According to Qwest, cable provider Cox, each of the nation's major wireless carriers, several dozen over-the-top VoIP providers, and numerous traditional competitive local exchange carriers ("CLECs") were all competing with Qwest for mass market

⁴ Qwest also sought forbearance for mass market and enterprise services from Part 61 dominant carrier tariffing requirements, Part 61 price cap regulations, and dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules concerning acquiring lines, discontinuing services, and assignments or transfers of control.

⁵ *First Phoenix Petition*, at 1.

and enterprise customers.⁶ Competition in the Phoenix MSA, in Qwest's view, was "far more advanced" than it had been in the Omaha MSA when, in 2005, the Commission granted limited forbearance from Section 251(c)(3) unbundling obligations.⁷

Upon completion of an extensive proceeding, on July 25, 2008, the Commission issued an order denying Qwest the requested relief in all four markets.⁸ Notwithstanding Qwest's representations, the Commission found that the record evidence did not satisfy the Section 10 forbearance criteria with respect to any of the forbearance Qwest sought. In reaching its decision, the Commission followed the approach it adopted in the *Omaha Forbearance Order*⁹ and subsequent decisions for determining when forbearance from unbundling obligations is justified.¹⁰ Specifically, the Commission found that "record evidence ... demonstrate[d] that Qwest is not subject to a sufficient level of facilities-based competition ... to grant relief under the Commission's precedent."¹¹

The Commission's action was consistent with its determination seven months earlier in the *Verizon 6-MSA Order*. In December 2007, the Commission issued an order denying Verizon forbearance from loop and transport unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.¹² There, as in the *Qwest*

⁶ *Id.*, at 1-2.

⁷ *Id.*, at 2.

⁸ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 (2008) ("*Qwest 4-MSA Order*").

⁹ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*") *aff'd* *Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

¹⁰ *Qwest 4-MSA Order*, at ¶ 35.

¹¹ *Id.*

¹² *Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia*

4-MSA Order, the Commission found insufficient actual facilities-based competition to satisfy the Section 10 criteria.¹³

Both Verizon and Qwest appealed the Commission's decisions denying their requests for forbearance from unbundling obligations to the D.C. Circuit. Verizon's appeal was filed in January 2008 and Qwest's appeal followed six months later.¹⁴ Verizon argued that the Commission erroneously denied its forbearance petitions by unlawfully departing from the legal standards and analyses in its prior forbearance orders. Specifically, Verizon contended that the FCC's order should be vacated because it relied on a new bright-line market share test to determine whether the retail market in the six MSAs at issue was sufficiently competitive to warrant forbearance from unbundling requirements.¹⁵ The central dispute in Qwest's appeal was the same market share issue that had been raised by Verizon. Consequently, Qwest, in a consent motion, asked the Court to defer briefing in its case until after the Court issued a decision in the Verizon case.¹⁶ On February 11, 2009, the D.C. Circuit ordered Qwest's appeal to be held in abeyance and directed the parties to file motions to govern further proceedings in the case 30 days after its disposition of the Verizon case.¹⁷

On June 19, 2009, the D.C. Circuit granted Verizon's petition for review on the limited ground that, in light of agency precedent, the Commission had not adequately explained

Beach Metropolitan Statistical Areas, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Verizon 6-MSA Order*").

¹³ *Verizon 6-MSA Order*, at ¶ 27.

¹⁴ *Verizon Telephone Companies v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008); *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. filed Jul. 29, 2008).

¹⁵ See Brief for Petitioners the Verizon Telephone Companies, *Verizon v. FCC*, No. 08-1012 (D.C. Cir.), filed Sept. 16, 2008, at 34.

¹⁶ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Qwest's Consent Motion for Extension of Time (filed Jan. 9, 2009).

¹⁷ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Feb. 11, 2009).

its decision to deny Verizon's petition on the basis of Verizon's retention of a specified percentage share of the retail market.¹⁸ The Court remanded – but did not vacate – the *Verizon 6-MSA Order* to the Commission for further explanation.¹⁹ In light of the Court's decision, on July 17, 2009, the Commission filed a motion to the D.C. Circuit for voluntary remand of the Qwest case.²⁰ The Commission stated that a remand would “give the Commission the opportunity to reconsider its analysis and decision ..., enabling it to issue a ruling on the Qwest petitions in light of the Court's guidance provided by the Verizon decision.”²¹ Qwest consented to the Commission's motion.²² And, on August 5, 2009, the Court granted the motion and remanded the case to the Commission.²³ Consequently, Qwest's original petition for forbearance from unbundling obligations in the Phoenix MSA is once again before the Commission for review, analysis and decision. On August 20, 2009, the Commission issued a Public Notice commencing the remand docket.²⁴

III. QWEST'S SECOND PHOENIX PETITION IS UNNECESSARY AND WOULD LEAD TO THE USELESS EXPENDITURE OF COMMISSION AND INDUSTRY RESOURCES

As explained above, Qwest's initial forbearance petition for the Phoenix MSA is once again before the Commission. In the coming remand proceeding, the industry and other interested parties will present evidence and provide input on the appropriate standard for the

¹⁸ *Verizon v. FCC*, No. 08-1012 (D.C. Cir. Jun. 19, 2009), Slip Op. at 12-18.

¹⁹ *Id.*, at 3, 18-19.

²⁰ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Motion of the Federal Communications Commission for a Voluntary Remand (filed Jul. 17, 2009) (“*FCC Motion*”).

²¹ *FCC Motion*, at 5.

²² *Id.*, at 1.

²³ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Aug. 5, 2009).

²⁴ *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, DA 09-1835 (rel. Aug. 20, 2009).

Commission to apply, Qwest will respond with additional analysis and advocacy, and the Commission will review the record, conduct its own analysis, decide on a standard, and apply that standard to the record to determine whether forbearance in the Phoenix market is warranted. Substantial resources will be expended by both governmental and non-governmental entities over many months before a decision is reached by the Commission. The resource-intensive nature of forbearance dockets has been noted by Commissioners on numerous occasions. For example, in his concurring statement accompanying the *Qwest 4-MSA Order*, Commissioner Michael Copps said: “I continue to hope that the Commission begins to tack on our own towards industry-wide rulemakings, where appropriate, rather than continue with the piecemeal, time consuming, and resource heavy forbearance process.”²⁵

If the instant motion is not granted and the second Phoenix petition remains before the Commission, the exact same process will have to be repeated in another proceeding. The same participants will be forced in the instant docket to undertake the identical tasks performed for the remand proceeding. The Commission, Qwest, and interested third parties each will be required to repeat their efforts with no perceptible additional benefits since, as Qwest notes, its more recent petition is simply a renewed attempt to gain forbearance in the Phoenix MSA.²⁶ The Commission can, and should, prevent this needless waste of agency and industry resources by expeditiously granting this motion.

²⁵ *Qwest 4-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 2. See also *Verizon 6-MSA Order*, Statement of Commissioner Michael J. Copps, Concurring; *Qwest 4-MSA Order*, Concurring Statement of Commissioner Jonathan S. Adelstein (“[T]he forbearance process continues to consumer a tremendous amount of resources of the Commission, our state commission colleagues, and market participants.”).

²⁶ *Second Phoenix Petition*, at 1 (“This marks the second Petition Qwest has made seeking the aforementioned forbearance for the Phoenix MSA.”).

The Commission has broad discretion in how it utilizes its resources and it routinely has taken its' and industry participants' resources into account when implementing a statute or establishing a rule or procedure. For example, in a 2007 order adopting a standard for assessing late fees under the Universal Service Fund program, the Commission explained that the new standard would address concerns that:

the cost to both the Commission and USAC of monitoring the Worksheets and administering the panopoly of collection and enforcement efforts and procedures are high and increasing, *imposing an additional burden on human and capital resources of both the Commission and USAC that diverts limited valuable resources from other requirements.*²⁷

In another 2007 order addressing a request for waiver of certain requirements under the Commission's price cap rules, the Commission explained that requiring Qwest to make additional competitive showings "would result in a duplication and waste of resources that would merely create undue administrative and regulatory burdens."²⁸ The Commission found that "the administrative burdens and delay of imposing such a showing [] would not serve the public interest."²⁹ Similarly, in its 2006 order revising the procedures related to radio broadcast stations, the Commission noted that "adopting the proposed new procedure will preserve limited agency resources."³⁰ The D.C. Circuit also has recognized that "[a]n agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most

²⁷ *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, 22 FCC Rcd 16372, ¶ 12 (2007) (emphasis added).

²⁸ *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, 22 FCC Rcd 7482, ¶ 7 (2007).

²⁹ *Id.*

³⁰ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community License in the Radio Broadcast Services*, 21 FCC Rcd 14212, ¶ 9 (2006).

pressing.”³¹ In the seminal case of *Natural Resources Defense Council v. SEC*, the D.C. Circuit explained that an agency “alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands.”³² These decisions highlight the Commission’s longstanding efforts to conserve its own and others’ resources. The Commission should continue to exercise its discretion to do so by dismissing Qwest’s second Phoenix forbearance petition.

It bears repeating that the only reason Qwest filed the second Phoenix petition is because the Commission denied its first petition seeking forbearance in the Phoenix MSA. By filing the second petition, Qwest sought to compel the Commission to “take another look” at the Phoenix market. With the Court’s remand of the *Qwest 4-MSA Order*, however, Qwest has won the second look at the Phoenix MSA that it desired. Thus, there is no need for the Commission to conduct a separate parallel proceeding to address Qwest’s second Phoenix petition.

Moreover, there is absolutely no basis for Qwest to argue that it would be prejudiced by the summary denial of its second Phoenix petition. As Qwest has admitted, the forbearance requested in the second Phoenix petition is identical to the forbearance sought in the initial petition and each of the factual and legal issues raised in the second petition will be before the Commission in the remand docket. Qwest will have ample opportunity in that proceeding to prove that it is entitled to the regulatory relief it seeks. In short, the only harm at issue here is the significant harm that would occur if the instant motion is not granted and the Commission and

³¹ *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987).

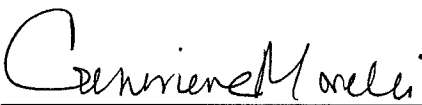
³² 606 F.2d 1031, 1056 (1979). *See also, e.g., Bachow Communications, Inc. v. FCC*, (D.C. Cir. 2001) (affirming a Commission decision to change license application rules which resulted in several applications being dismissed and explaining that the Commission properly “balanced the need to implement the new regulatory regime against the effect of upsetting the expectations of appellants and others.”).

interested parties are forced to expend the substantial energy and resources necessary to litigate the second petition.

IV. CONCLUSION

For all of the reasons outlined above, the Commission should summarily deny Qwest's instant forbearance petition.

Respectfully submitted,

By: 
Brad Mutschelknaus
Genevieve Morelli
KELLEY DRYE & WARREN LLP
3050 K STREET, NW
SUITE 400
WASHINGTON, DC 20007
202-342-8400 (PHONE)

*Counsel to Broadview Networks, Inc.,
Nuvox, and XO Communications, LLC*

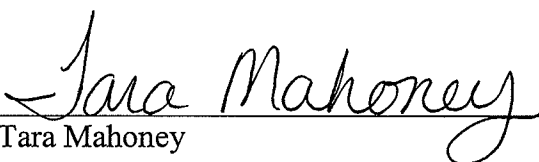
August 25, 2009

CERTIFICATE OF SERVICE

I, Tara Mahoney, hereby certify on this 25th day of August, 2009, that copies of the foregoing Motion for Summary Denial were served via first-class mail, postage-prepaid, to the following:

Tim Stelzig
Denise Coca
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Craig J. Brown
Harisha J. Bastiampillai
Qwest
607 14th St., NW
Washington, D.C. 20005



Tara Mahoney